No. 78-1586

In the Supreme Court of the United States

OCTOBER TERM, 1978

ERNEST A. WINKLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 587 F. 2d 705.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1979. A petition for rehearing was denied on February 8, 1979 (Pet. App. B). The petition for a writ of certiorari was filed on March 12, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed reversible error in excluding certain testimony when no offer of proof was made by petitioner.

2. Whether evidence of petitioner's prior similar conduct was properly admitted at trial.

3. Whether the district court properly denied petitioner's motion for a new trial based on alleged extrinsic influence on the jury's deliberations.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on 19 counts of submitting fraudulent Medicare payment requests, in violation of 18 U.S.C. 2 and 1001. He[1] was sentenced to concurrent five-year terms of imprisonment on each count. The court of appeals affirmed, one judge dissenting (Pet. App. A).

At trial, the government introduced evidence to support the charge that petitioner engaged in a conspiracy with other persons to obtain government payments for services not lawfully compensable under the Medicare program. The conspiracy had several parts.

First, petitioner, while head salesman of a Tampa, Florida medical laboratory, engaged in a physician kickback scheme (1A Tr. 59, 66, 72). Petitioner and his trained team of salesmen would offer physicians medical testing services free of charge (1A Tr. 66, 435; 3A Tr. 1308). Petitioner's laboratory, in turn, would bill Medicare and then remit to the physician a "referral fee" or kickback (1A Tr. 66, 438; 2A Tr. 651). In a second arrangement, petitioner caused chiropractors to order tests from his lab. Despite a statutory provision (42

U.S.C. 1395x(r)(5)) barring Medicare payments for such chiropractic services, petitioner charged those tests to the Medicare program (1A Tr. 83; 2A Tr. 592, 617-619, 632-633). Some of the chiropractors participating in this scheme also received kickbacks (2A Tr. 616, 639, 651, 704, 742). A third arrangement used to defraud the Medicare program involved a scheme by which petitioner would induce nursing home personnel to order respiratory tests for patients, despite the fact that they were not medically required (1A Tr. 92-94; 3A Tr. 1312-1313).[1] In furtherance of that plan, petitioner submitted 19 billing forms to Medicare bearing fictitious diagnoses and claiming payment for therapies never authorized by a physician (1B Tr. 62-70, 258-259; 3A Tr. 1459-1472).[2] The submission of these spurious billing forms provided the basis for the substantive counts of the indictment on which petitioner was convicted.[3]

ARGUMENT

1. Petitioner contends (Pet. 7-9) that the district court erred in excluding evidence of his recollection of certain statements made by government witnesses during conversations with him.[4] He contends that his recollection of the

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[1]42 U.S.C. 1395y(a)(1) prohibits the payment of Medicare funds for medical expenses "which are not reasonable and necessary for the diagnosis or treatment of illness or injury * * *."

[2]42 C.F.R. 405.250(b)(1) requires claims for payment to be accompanied by a physician's certification that medical or health services actually rendered were "medically required."

[3]The jury was unable to reach a verdict on the count of the indictment alleging conspiracy. On the government's motion, the conspiracy count was dismissed.

[4]Petitioner was permitted to testify as to the substance of his own remarks during conversations with the witnesses, but was not permitted to testify about the remarks of the others.

substance of those conversations would have impeached the testimony of the government witnesses.

In an opinion on which we generally rely, the court of appeals concluded (Pet. App. A-6) that any error in excluding such testimony did not constitute reversible error because petitioner, as the proponent of the excluded evidence, failed to comply with the requirement of Fed. R. Evid. 103(a)(2) that he disclose the substance of his proposed testimony.[5] That holding was correct.

Compliance with the requirement of an offer of proof enables the trial judge to determine whether the proffered evidence is relevant and competent, or whether it is cumulative or otherwise inadmissible. See Fed. R. Evid. 402, 403. It also ensures that the record will be sufficiently developed to permit appraisal by an appellate court of the propriety of the ruling in a particularized context. See 1 *Weinstein's Evidence* para. 103[03], at 103-27 (1978).

As noted by the court of appeals (Pet. App. A-7), the mere recital by counsel that petitioner would testify as to "his version" of the conversations in question fell far short of indicating "the manner in which his contradiction or denial of what had already been adduced would have been admissible or helpful." Counsel's recital certainly did not show the impeachment value of the excluded testimony. Moreover, the "context" of the preceding testimony did not apprise the trial court of the relevance and necessity of the undisclosed testimony. It is also clear that an offer of proof would have been easy to render, since petitioner's

[5]Under Rule 103(a)(2), error cannot be predicated on a ruling excluding evidence unless the trial judge was informed of the substance of the proposed testimony through an offer of proof, or could ascertain the substance of the testimony from the context.

attorney was not faced with a situation where he was unaware of what the witness would say. Accordingly, the court below was fully justified in declining to entertain a claim of erroneously excluded testimony where petitioner's counsel made no effort to comply with the requirement of an intelligible offer of proof.

Moreover, as the court below also concluded, any error in placing limitations on petitioner's testimony was harmless (Pet. App. A-7 n.11). As the court noted, there was little point to be made by the proposed testimony. *Ibid.* For the most part, the witnesses that petitioner sought to contradict with his recollection of the conversations in question either did not testify concerning the conversations or merely recounted in court what petitioner had stated. Petitioner was afforded full opportunity to explain what he said and what he did not say, thereby correcting any misimpressions about the substance of his remarks. Similarly, there was no prejudice in foreclosing petitioner's account of his wife's words during their initial conversation concerning the preparation of Medicare billing forms (Pet. App. A-8 n.11). Mrs. Winkle, who appeared as a defense witness, stated that petitioner was generally unfamiliar with the forms (1B Tr. 593-594). Petitioner's own testimony (2B Tr. 1042) shows that he did not intend to contradict his wife's recollection on this matter. Mrs. Winkle was a defense witness, and petitioner gave no indication that he intended to impeach her credibility.[6]

[6]The district court's rulings on the admissibility of evidence, relating to the credibility of various witnesses, were routine discretionary rulings. The question on review, as recognized by the court of appeals, was whether, under all the circumstances, any error in such rulings affected petitioner's substantial rights. See Fed. R. Evid. 103(a). It is not necessary to inquire whether such rulings were "harmless beyond a reasonable doubt," as would be the case if constitutional error were at issue. See, *e.g.*, *United States* v. *Valle-Valdez*, 554 F. 2d 911, 915-916 (9th Cir. 1977).

2. Petitioner also contends (Pet. 15-18) that evidence of his participation in prior similar Medicare transactions should not have been admitted at trial. As the court of appeals correctly held (Pet. App. A-8), however, such evidence was relevant to petitioner's intent to defraud the government and also tended to show the absence of mistake or accident on his part.

It is well established that evidence of prior similar acts, whether or not those acts are themselves illegal, may be introduced to prove a defendant's intent, preparation, plan, knowledge, or the absence of mistake. Rule 404(b), Fed. R. Evid.; *Andresen* v. *Maryland*, 427 U.S. 463, 483-484 (1976). Such evidence is admissible unless its probative value is outweighed by its prejudicial effect. Fed. R. Evid. 403. See *United States* v. *Gubelman*, 571 F. 2d 1252, 1255 (2d Cir.), cert. denied, 436 U.S. 948 (1978); *United States* v. *James*, 555 F. 2d 992, 998-999 (D.C. Cir. 1977); *United States* v. *Czarnecki*, 552 F. 2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977). The determination whether the evidence should be admitted under this standard is a matter committed to the discretion of the trial court. See, *e.g.*, *United States* v. *Bloom*, 538 F. 2d 704, 709 (5th Cir. 1976); *United States* v. *Calvert*, 523 F. 2d 895, 908 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

In the instant case, the issues of innocent state of mind and accident or mistake were clearly raised by petitioner's defense. Throughout the trial, petitioner asserted his complete innocence, maintaining that he conducted his affairs in accordance with governing Medicare regulations and in the belief that his actions were proper. Evidence of his involvement with forged and improperly executed billing documents[7] was highly probative of petitioner's

[7]At trial, the government introduced two Medicare payment request forms, signed "Ernest A. Winkle," relating to X-rays provided by a company designated Integrated Medical X-ray Services. A physician testified that he had refused to sign one of the forms, brought to him by a person named Ernest A. Winkle, because the patient listed on the form was not his (1B Tr. 114-119). The physician's signature on a second form had been forged (1B Tr. 116-117). It was further established through testimony of a former technician of Integrated Medical X-ray Services that during his employment, which ended two months prior to the date the Medicare forms were submitted to a Blue Cross organization, the company was operated by petitioner and handled testing and laboratory work (1B Tr. 124-125).

Petitioner contends (Pet. 16-17) that there was no in-court identification of him as the Ernest A. Winkle involved in the prior transactions and that no one testified that the payment request forms had been processed by a government agency. However, in light of the fact that petitioner's name appeared on the forms, that a doctor recalled that a man with petitioner's name presented the forms, and that the forms were payment claims for laboratory services provided by a firm operated by petitioner, the link between petitioner and the prior transactions was clear and unmistakable. Under Fed. R. Evid. 404(b), evidence of other "wrongs" and "acts," as well as other "crimes," may be introduced when relevant to the state of mind issues in a case. Such questions of admissibility are subject to usual standards of relevance. See, *e.g.*, *United States* v. *Maestas*, 546 F. 2d 1177, 1180-1181 (5th Cir. 1977); *United States* v. *Senak*, 527 F. 2d 129, 143 (7th Cir. 1975).

familiarity with Medicare procedures and his intent to defraud the government. Under such circumstances, the district court did not abuse its discretion in admitting such evidence. See *United States* v. *Chrzanowski*, 502 F. 2d 573, 575-576 (3d Cir. 1974).

Significantly, the trial court instructed the jury that evidence of other acts was only to be considered in connection with the state of mind issue, and could not be considered in determining whether petitioner acted as charged (1B Tr. 135):

> Now, ladies and gentlemen, I instruct you that evidence concerning alleged earlier acts of a like

nature by a defendant may not be considered by you in determining whether the accused committed any act charged in the indictment in this case. You should not consider any such evidence for any purpose whatever unless * * * you first find that the other evidence in the case, standing alone establishes beyond a reasonable doubt that the defendant did this particular act or acts charged in a particular count of the indictment * * *. If you should find beyond a reasonable doubt from the other evidence in the case that said defendant did the act or acts charged in a particular count under deliberation, then you may consider evidence as to alleged earlier acts of a like nature, in determining the state of mind or intent with which the accused did the act charged in a particular count in the indictment * * *.

3. Finally, petitioner contends (Pet. 6-7, 22-23) that the trial court erred in denying his motion for a new trial based on alleged jury impropriety.

The relevant facts are detailed in the opinion of the court of appeals (Pet. App. A-10 to A-11). Petitioner's trial counsel received a post-verdict telephone call from the jury foreman indicating that a juror named Shifler had disclosed to the jury that co-defendant Alan Colmar had entered a guilty plea.[8] Petitioner's counsel, after conferring with petitioner, chose not to reveal this possible impropriety to the trial judge.

Following sentencing, a new defense counsel filed a notice of intention to interview trial jurors to investigate the impropriety. The district court ordered that no

[8]Co-defendant Colmar was present during jury selection. He later pleaded guilty. In accordance with a defense request, the jury was not told of the reason for Colmar's absence when trial commenced.

interviews be conducted and instead convened a post-trial hearing to consider the matter. The jury foreman testified that during deliberations on the conspiracy count of the indictment, a juror named Marjorie Graham told the jury that Colmar had pleaded guilty. The foreman could not recall how Graham had acquired that information. At a supplemental hearing, juror Graham testified that she had "supposed" Colmar pleaded guilty since that would explain his absence after his initial appearance. She had no recollection of Colmar's plea having been discussed either by herself or any other jury member. Based on this testimony, as well as on the "repeated instructions to the jury to avoid extrinsic influences on their deliberations, and the trial counsel's ethical breach both in speaking to the jury foreman and in not reporting the incident to the court," the district court denied petitioner's motion for a new trial (Pet. App. A-11; footnote omitted).

As the court below correctly noted (Pet. App. A-11), the government bears the burden of showing that an accused has not been prejudiced when the jury has been exposed to improper extrinsic influences. Assuming that those influences were present here, the record establishes clearly that petitioner was not prejudiced by the incident. Any possible speculation by a juror about Colmar's guilty plea could only have related to the conspiracy count, as to which Colmar and petitioner were both named as defendants. But the jury did not convict petitioner on the conspiracy count; his convictions rested on substantive counts that were distinct from the conspiracy count involving Colmar. Because petitioner's convictions on the substantive counts were based on documentary and testimonial evidence that the court found to be "not only relatively discrete but damning," it properly concluded that there was no "genuine possibility of prejudice to the defendant in his trial on the substantive counts from the

jury's awareness, with respect to the conspiracy count, that he may have been associated with a criminally tainted individual" (Pet. App. A-12).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]This case bears no resemblance to *Remmer* v. *United States*, 350 U.S. 377, 381-382 (1956), relied on by petitioner. There, the foreman of the jury had had conversations with a friend of the defendant, who offered a lucrative bribe if the foreman decided the case in favor of the defendant. Under all the circumstances, that massive and criminal intrusion into the jury's deliberations prevented an impartial verdict. The prejudicial potential of the juror's speculations about Colmar's plea is obviously not of the same magnitude.

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